wise, instead of officers discharging their duties in accordance with their own official discretion, that of a court would be substituted therefor."

The whole matter may be summed up in the following statement, which finds abundant support in the cases cited: The purely administrative or ministerial functions of a board of medical examiners are subject to control by mandamus. If a board should fail to act when it is its duty to act, action may be compelled. But insofar as the functions of a board are discretionary in their nature, and hence of a quasi-judicial character, they cannot, in the absence of abuse of discretion, be reached by mandamus. Abuse of discretion, however, or any acts on the part of a board that are arbitrary or irregular will justify the use of the writ. *People ex rel. Sheppard* v. *State Board of Dental Examiners,* 110 Ill. 180; *Dental Examiners* v. *People,* 123 Ill. 227; *Illinois State Board of Health* v. *People,* 102 Ill. App. 614; *State ex rel. Powell* v. *State Medical Examining Board,* 32 Minn. 324, 20 N. W. Rep. 238, 50 Am. Rep. 575; *State ex rel. Granville* v. *Gregory,* 83 Mo. 123; *Williams* v. *Dental Examiners,* 93 Tenn. 619, 27 S. W. Rep. 1019; *State ex rel. Kirchgessner* v. *Board of Health of Hudson County,* 53 N. J. Law 594, 22 Atl. Rep. 226; *Van Vleck* v. *Board of Dental Examiners* (Cal.), 48 Pac. Rep. 223.

H. B. H.

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LIABILITY FOR INJURIES ARISING FROM THE USE OF DANGEROUS SUBSTANCES SOLD IN THE OPEN MARKET.—The defendant, Rommeck, a retail hardware dealer, sold to the plaintiff a package of stove polish manufactured by defendant, Crosby & Co. When plaintiff attempted to use the polish, it exploded, injuring her. The declaration proceeded on the theory that there rested upon both defendants the positive duty of knowing that the polish was a dangerous substance, and that they should not manufacture and sell dangerous and inflammable substances. There was no averment that defendants had actual knowledge of the inflammable nature of the goods, nor was it averred in what manner they were negligent in not knowing their inflammable nature. Both defendants demurred, Rommeck's demurrer being sustained, and that of Crosby & Co. being overruled. The Supreme Court in *Clement* v. *Crosby & Company,* 148 Mich. 293, 111 N. W. 745, affirmed the overruling of the corporation's demurrer, and in the present case the court affirms the judgment sustaining Rommeck's demurrer. *Clement* v. *Rommeck* (1907), — Mich —, 113 N. W. Rep. 286.

The question which presents itself squarely for decision is whether a retail merchant who buys in the open market stove polish which purports to be safe and proper for use, and sells the article for a purpose for which it is apparently intended, is liable, *in the absence of negligence,* if it turn out that the article is not adapted to the use and causes injury. In *Clement* v. *Crosby & Company,* supra, the court overruled the demurrer, but the declaration was so drawn that it was not necessary to decide whether or not actual knowledge of the dangerous properties must be shown to be in the manufacturer to render it liable in the circumstances, and the court expressly said that they did not mean to determine the necessity of a scienter, although the allegation of

deceitful and artful withholding of knowledge from the public necessarily implied a knowledge on the part of the defendant. The court cited the following cases to show that one who places upon the market a dangerous article may be chargeable for injuries done to third persons; but a reading of the cases discloses the fact that the defendants either knew of the dangerous qualities of the goods or else were guilty of negligence. *Barney* v. *Burstenbinder,* 7 Lans. (N. Y.) 210; *Davis* v. *Guarnieu,* 45 Ohio St. 470; *Hall* v. *Rankin,* 87 Ia. 261; *Shubert* v. *J. R. Clark Co.,* 49 Minn. 331; *Carter* v. *Towne,* 98 Mass. 567; *Wellington* v. *Downer Kerosene Oil Co.,* 104 Mass. 64; *Elkins, Bly & Co.* v. *McKean,* 79 Pa. 493.

There are cases, however, which upon principle would seem to indicate that knowledge by the manufacturer is not necessary to charge him with liability. In *Randall* v. *Newsom,* 2 Q. B. Div. 102, the court held that in the sale of a pole furnished by the defendant for plaintiff's carriage there was an implied warranty that the pole was free from latent as well as discoverable defects. In *Carleton* v. *Lombard,* 149 N. Y. 137, it was held that in a contract for the sale of a quantity of petroleum of a certain quality, the contract was not satisfied unless the oil was free from latent or hidden defects that rendered it unmerchantable at the time and place of delivery, and that could have been avoided or guarded against in the process of refinement, or in the selection of material by reasonable care and skill. See also *Kellogg Bridge Co.* v. *Hamilton,* 110 U. S. 108; *Rodgers* v. *Niles,* 11 Ohio St. 48.

In the principal case the plaintiff relied on the decisions in *Craft* v. *Parker,* 96 Mich. 245, and *Hoover* v. *Peters,* 18 Mich. 51. These cases ruled that in the sale of articles of food by a dealer in such goods for domestic consumption, there is an implied warranty that the food is wholesome. See also *Van Bracklin* v. *Fonda,* 12 Johns. 468. The contention was that an analogous principle ought to be applied in the case before the court, but the court refused to so rule, saying, "We are not aware that the rule of these cases has been extended to the sale of commodities like stove polish." The decision was based on the case of *Brown* v. *Marshall,* 47 Mich. 576. The facts in this case were briefly these: Plaintiff sent her sister to defendant's drug store to purchase some salts and was waited upon by a clerk of the defendant. The clerk delivered what he said was the article called for, but in fact it was a poison. Plaintiff took a portion of it and immediately became ill. At the trial the court instructed that if the defendant's clerk sold and delivered to the plaintiff a poison instead of a harmless drug, and the plaintiff took it supposing it to be harmless, and was thereby injured, the defendant was liable for all damages so caused. The Supreme Court ordered a new trial, for the reason that the trial court erred in the above instruction, in that it did not include negligence as an element to be necessarily considered. The court distinguished the case from the leading case of *Thomas* v. *Winchester,* 6 Seld. (N. Y.) 397, saying that in that case the liability was expressly grounded upon actual negligence. The case presents a confusion of ideas regarding tort actions based on negligence of manufacturers or dealers, and actions upon implied warranties. The case of *White* v. *Oakes,* 88 Me. 367, seems to be in point with the principal case. The defendants, being dealers in furniture and

not manufacturers, sold a folding bed to the plaintiff without any express warranty of any kind. The bed proved dangerous to persons using it, not from defective parts but from faulty design. By reason of the fault the bed collapsed, injuring plaintiff. The defendants had no knowledge of this danger. The mechanism of the bed could be observed by the plaintiff as well as by the defendant, but neither, unless skilled in mechanics, would have been likely to have discovered the danger. The court held there was no liability.

R. F. M.

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THE EFFECT UPON AN ILLEGAL MARRIAGE OF COHABITATION AFTER THE REMOVAL OF THE IMPEDIMENT.—The defendant's wife obtained a decree of divorce from him, but before the decree became absolute he married another woman. The parties involved in this latter marriage separated, but subsequently cohabitated after the divorce obtained by the first wife was made absolute. On an indictment charging defendant with polygamy, the Massachusetts court held that the invalidity of such second marriage was not cured by the subsequent cohabitation of defendant and his second wife after such decree became absolute. *Commonwealth* v. *Stevens* (1907), — Mass. —, 82 N. E. Rep. 33.

The question whether a marriage, void because of an existing marriage, can be made valid by cohabitation after the removal of the impediment, is decided in the following cases: *Williams* v. *State,* 44 Ala. 24, where the court held that cohabitation, though evidence of marriage, cannot make a void marriage valid. The Illinois court, in *Cartwright* v. *McGown,* 121 Ill. 338, held that cohabitation after the removal of the impediment will not alone change the marriage from being meritricious. Similar holdings are found in *Summerlin* v. *Livingston,* 15 La. Ann. 519; *Thompson* v. *Thompson,* 114 Mass. 566; *Voorhees* v. *Voorhees,* 46 N. J. Eq. 411; *Pettit* v. *Pettit,* 105 App. Div. 312, 93 N. Y. S. 1001; *Collins* v. *Collins,* 80 N. Y. 1; *Hunt's Appeal,* 86 Pa. St. 294.

On the other hand the following cases are opposed to the doctrine laid down in the principal case: *Stein* v. *Stein,* 66 Ill. App. 526; *Blanchard* v. *Lambert,* 43 Iowa 228; *Donnelly* v. *Donnelly,* 8 B. Mon. (Ky.) 113; *Turner* v. *Turner,* 189 Mass. 373, 109 Am. St. Rep. 643, 75 N. E. 612; *State* v. *Worthington,* 23 Minn. 528; *Chamberlain* v. *Chamberlain,* 68 N. J. Eq. 414, 62 Atl. 680; *Fenton* v. *Reed,* 4 Johns. (N. Y.) 52; *Rose* v. *Clark,* 8 Paige (N. Y.) 574; *Taylor* v. *Taylor,* 25 Misc. Rep. (N. Y.) 566, 55 N. Y. S. 1052; *The Breadalbane Case,* L. R. 1 H. L. Sc. 182; *De Thoren* v. *Attorney General,* L. R. 1 App. Cas. 686. *Taylor* v. *Taylor,* supra, decided that a marriage entered into by a woman whose former husband was absent for five successive years, and who was not known to be living, is voidable and is made valid by the continued cohabitation of the parties after the former husband's death. The court in *Chamberlain* v. *Chamberlain,* supra, followed the holdings of *The Breadalbane Case* and *De Thoren* v. *Attorney General.* The case was distinguished from *Voorhees* v. *Voorhees,* supra, decided by the same court fifteen years before, in that the marriage was contracted in good faith, the parties